69-3100-7107-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Phillip A. McAfee,

Petitioner,

vs.

RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION

Department of Revenue,
Department of Employee Relations,
and Office of the Attorney General,

Respondents.

The above-entitled matter is before the undersigned Administrative Law Judge on Motions for Summary Disposition made by the Minnesota Department of Revenue (Revenue), the Minnesota Department of Employee Relations (DOER), and the Office of the Attorney General (AG).

Catherine M. Keane, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of the Respondents. Alfred M. Stanbury, Attorney at Law, 2209 St. Anthony Parkway,
Minneapolis, Minnesota 55418, appeared on behalf of the Petitioner. The record closed on June 2, 1993, upon the receipt of the final Memorandum.

Based on the record herein and for the reasons stated in the following memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that the Respondents' motions for summary disposition be GRANTED and that Petitioner's petitions be DENIED.

Dated: July 2nd 1993.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

This case arises out of a vacancy for an Attorney I position at Revenue that was considered by Revenue and approved by DOER as a temporary unclassified position. Veterans preference was not applied in filling the position. Respondents argue that veterans preference does not apply to temporary unclassified positions. Petitioner argues that it does or that the position was not properly designated as temporary unclassified. On December 11, 1992, a summary disposition motion was filed by Revenue. That motion was stayed pending completion of adequate discovery to allow Petitioner to respond to the summary disposition motion. The Administrative Law Judge issued an Order on April 27, 1993, ruling in essence that discovery has been adequately completed to permit Petitioner to respond to the summary disposition motion. On May 21, 1993, the Judge consolidated Petitioner's case against Revenue with those against DOER and the AG. Motions for summary disposition were filed in those matters as well.

The Respondents have moved for summary disposition on the grounds that there are no material issues of fact in dispute and they are entitled to disposition of this case in their favor as a matter of law. Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp,, 378 N.W.2d 63, 66 (Minn.App. 1985); Minn.R.Civ.P. 56.03 (1984).

In a motion for summary disposition as a defense, the initial burden is on the moving party to allege that no facts exist that establish a prima facie case and to show that no genuine issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). A genuine issue of fact is one that is not sham or frivolous. Once the moving party has established that no prima facie case exists, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company_v._Retrum, 456 N.W.2d 719, 723 (Minn.App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v.. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986) ; Highland Chateu v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn.App. 1984) . General

averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. id. ; Carlisle v. City of -Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v., Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of that view of the evidence which is most favorable and all doubts and inferences must be resolved against the moving party. See e. g., Celotex Corp. v. Catrett, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988) ; Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); DDollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn. App. 1985),

Petitioner is a veteran entitled to the rights provided by Minn. Stat. 43A.11. He asserts that his right to veterans preference in hiring has been

denied by Respondents. There is no dispute that veterans preference points were not Included in the hiring process used by Respondents. Revenue sought to fill a position in the Attorney I class dedicated to performing work related to Minnesota Care, the state-wide health care system adopted in Minn. Laws 1992, ch. 549. Revenue's initial request for a temporary unclassified position was made to DOER on July 8, 1992. DOER processed the requested position as one for designation as "Temporary Unclassified." After requesting approval of the position from DOER, Revenue advertised the position at local law schools and posted notice of the vacancy internally. Twenty-four persons applied for the position. Revenue selected eight persons, including Petitioner, to receive interviews. Petitioner was interviewed on September 4, 1992. Revenue employees asked each interviewee the same questions. No scores were compiled between candidates. No veteran's preference points were added or factored into Revenue's choice. A person who was not a veteran of the U.S. Armed Forces was hired for the position.' She began work on October 14, 1992.

The Respondents argue that veterans preference does not apply to unclassified positions. Petitioner advances several theories as to how veterans preference does apply. If any of Petitioner's theories are correct, summary disposition would be properly granted in his favor on the issue of violating the veteran's preference act. The proper relief for the violation would remain to be decided.

Minn. Stat. 43A.11 (1992) governs veteran's preference in hiring for state employment and provides in pertinent part as follows:

> Subdivision 1. Creation. Recognizing that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination, a veteran's preference shall be available pursuant to this section to a veteran as defined in section 197.447.
>
> Subd. 3. Nondisabled veteran's credit. There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.
>
> Subd. 4. Disabled veteran's credit. There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points . . . .

"Competitive open" is defined in Minn. Stat. 43A.02, subd. 15 (1992), to mean situations in which "eligibility to compete in an examination for state employment is extended to all interested persons."

1/ The resume of the successful candidate indicates that she served in the Israeli Defense Force, with a rank of first lieutenant, from 1972 through 1973. Petitioner's June 1, 1993 Memorandum, Exhibit 3.

Minn. Stat. Ch, 43A establishes a civil service system where most employees are in the classified service, except for certain specified positions that are placed in the unclassified service. Such positions generally include the top elective and appointed positions, confidential employees and employees in temporary positi ons and are all posti ons where the appointing authority should have the freedom to hire and fire the employee at will or when other reasons exist that the normal civil service protections should not apply to the employees in such positions. Employees in the classified service must, with some exceptions, be hired through the open competitive examination process; employees in the unclassified service may be hired in any manner the appointing authority desires.

The method used to fill cl ass ified positi ons begins with DOER conducting examinations (which may consist of a paper review of applicants' experience and training), compiling scores, and preparing eligible lists . See Minn. Stat. 43A.10 and 43A.13. An applicant's examination score must meet a preestablished minimum score (the "passing score") to be considered. Those candidates with a passing score are ranked by score. Minn. Stat. 43A.12, subd. 4. Veterans preference points are added to the passing score of veterans to arrive at the final ranking of eligibles. Id. Where candidates' scores are tied, veterans are ranked ahead of nonveterans. Minn. Stat. 43A.11, subd. 7. Where a range of scores exist, the top twenty names are referred to the agency for interviews, assessment, and hiring. Minn. Stat. 43A.13, subd. 4(a). All of the candidates which tie the twentieth score are included in the list. Id. When a list of eligibles is certified, the employing agency may choose any candidate from the list to fill the position, regardless of the candidate's veteran status.

If the Attorney I position for which Petitioner applied was a properly approved temporary unclassified position, then veterans preference does not apply. By its terms, Minn. Stat. 43A.11 applies only to positions filled through competitive open examination and in the case of certain disabled veterans, competitive promotional examination. Under Minn. Stat. 43A.10, subd. 1, entrance to the classified service must be through competitive examination. Unclassified positions are not required to be filled through such examinations.

Petitioner argues that the veterans preference statute requires addition of preference points regardless of whether the position is classified or unclassified. Petitioner cites Minn. Stat. 197.455 (1992) which states:

> The provisions of section 43A.11 granting preference to veterans In the state civil service shall also govern

preference of a veteran under the civil service laws, charter provisions, ordinances, rules or regulations of a county, city, town, school district, or other municipality or political subdivision of this state, except that a notice of rejection stating the reasons for rejection of a qualified veteran shall be filed with the appropriate local personnel officer. Any provision in a law, charter, ordinance, rule or regulation contrary to the applicable provisions of section 43A.11 is void to the extent of such inconsistency . . . .

Petitioner asserts that the language "granting preference to veterans in the state civil service" means all veterans in the state civil service, classified and unclassified. lee Minn. Stat. 43A.02, subd. 10 (defining "civil service" as "all positions in the classified and unclassified services"). The Respondents argue that Minn. Stat. 197.455 grants no additional rights to state employees or applicants beyond those contained in Minn. Stat. 43A.11.

The Respondents' analysis is correct. This provision was enacted in 1975 to replace the prior Minn. Stat. 197.45 which had granted veterans absolute preference in hiring in political subdivisions. Minn. Laws 1975, Ch. 45, 4 and 7. This section does not grant or modify veterans preference in state civil service, it simply makes the point system set forth in Minn. Stat. 43A.11 applicable to political subdivisions. The words "granting preference to veterans in the state civil service," were simply a statement that the state system was to be applied in political subdivisions, there was no intent to define the state system or add any requirements to it.

Petitioner cites Hall v. City of Champlip, 463 N.W.2d 502 (Minn. 1990) for the proposition that a 100-rating system must apply to all positions except those specifically exempted from the Veterans Preference Act by Minn. Stat. 197.46. The court in Hall referred to the fact that Minn. Stat. 197.455 made the state system applicable to political subdivisions and held that political subdivisions could not escape the impact of Minn. Stat. 43A.11 by not implementing a civil service system. It should be noted that Hall does not say that political subdivisions may not adopt civil service systems under which certain positions are unclassified. In fact, Minn. Stat. 197.46 explicitly provides that nothing in 197.455 or 197.46 shall be construed to apply to the position of private secretary, teacher, superintendent of school,, or one chief deputy of any elective official or head of a department, or to any person holding a strictly confidential relation to the appointing officer. The uniform and intended effect of the veterans preference law is that veterans preference applies to all state and political subdivision employment except high level positions, confidential positions and temporary positions of the sort often identified as unclassified positions.

Hall is also cited by Petitioner to support his argument that a competitive open examination is not limited to a formal written examination. Memorandum in Opposition, at 5. That point is not at issue in this case. Any examination can fill the role of the competitive open examination. The question is whether the requirement for a competitive open examination applies here.

Petitioner asserts that "there is nothing in the law which prohibits

unclassified positions from being filled by open competitive examination." Memorandum in Opposition, at 5 (emphasis in original). This argument proves nothing; the point is that nothing requires them to be filled by open competitive examination.

Petitioner also argues that the Attorney I position was filled by an "open competitive examination" because it was open to anyone who applied, was advertised to the public, all applications were reviewed and a number of applicants were interviewed before a person was selected to fill the position. The fact that an appointing authority chooses to openly solicit applications, review them and interview selected applicants before making a hiring decision does not change the classification of the job from unclassified to classified.

Petitioner argues that the Attorney I position was improperly designated as "temporary unclassified." Three alternative grounds have been advanced to support this theory. First, Petitioner asserts that Revenue knew the position it sought to fill was not appropriate for designation as temporary unclassified due to its own expectations for the position. Second, Petitioner argues that DOER did not properly apply the standards in Minn. Stat. 43A.08, subd. 2a, in approving the position as temporary unclassified. Third, Petitioner asserts that the position was not properly processed by DOER.

Revenue maintains that the classification decision is DOER's to make and the Administrative Law Judge "must defer to DOER's expertise on the subject." Revenue Supplemental Memorandum, at 4. The appropriate scope of review here is similar to that set out in State ex rel. Meehan v. Empie, 204 N.H. 5572 (Minn. 1925). The court stated:

> The question of qualification or fitness is first and primarily for the appointing body. The trial court on mandamus, or this court on review, cannot substitute its own view of the fact. Only when the appointing power . . declines to apply the law, or proceeds with manifest arbitrariness . . . can relief be had by mandamus.

Empie, at 574. The Judge and Commissioner of Veterans Affairs have jurisdiction to determine whether the Petitioner was denied his veterans Preference rights. Such denial could arise through the improper designation of a position. The review here is limited to determining whether the designation was prope;ly made for the purpose of protecting veterans preference rights. Any assertion of error by DOER or Revenue which does not relate to the veterans preference claim is beyond the jurisdiction of the Judge and the Commissioner of Veterans Affairs.

Under certain circumstances, a position may be designated by the Commissioner of DOER as "temporary unclassified." The statutory provision reads as follows:

> The commissioner, upon request of an appointing authority, may authorize the temporary designation of a position in the unclassified service. The commissioner may make this authorization only for professional, managerial or supervisory positions which are fully anticipated to be of limited duration.

Minn. Stat. 43A.08, subd. 2a.

Petitioner argues that Revenue did not "fully anticipate" that the position would be of limited duration. The statements of Thomas Boekhaus, one of the Revenue interviewers, are cited as supporting this position. Regarding

what was told to interviewees, Boekhaus stated:

> 6. 1 explained (to the interviewees) that the position had been approved on a temporary basis for up to one year initially and it was possible that the temporary appointment could be extended for up to three years. At the same time, I explained that the position could be of

> shorter duration and even be less than a year and that, for a number of reasons, we did not know how long the Department would need to fill the position.
>
> 5. (sic) I also said that after three years or before, the Department could decide to establish a permanent position for this purpose and that therefore, the position itself could last more than three years ....

Boekhaus Affidavit, at 2.

Petitioner also quotes a memorandum from Boekhaus to Kathy Zieminski of Revenue's Human Resource Management Division wherein he stated:

> I need authorization to hire an attorney on a temporary basis, or other limited-term capacity.
>
> I recommend that this position be a temporary appointment for three reasons. First, there is much "front-end" work that needs to be done right away in the form of rules, legal opinions, revenue notices and legislation to insure that the tax is viable. We don't know if there will be enough work to justify a permanent full-time attorney. Second, there is uncertainty as to how the Department will administer the new tax. Until that is clarified the position should remain flexible. Third, this Division is presently unable to absorb this large a volume of work with the present staff.

Boekhaus Affidavit, Exhibit A.

Barb Wemeier of Revenue's Human Resource Management Division stated in a memorandum to DOER:

> They wish to fill this positi on on a temporary basis be c ause there is much 'front-end' work that needs to be done . . . . However, they don't know if there will continue to be enough work to justify a permanent full-time attorney in this area in the future . . . .
>
> They would like to set up the position for one year intially, then reevaluate at that time to either extend or create a permanent position.

Vikmanis Affidavit, Exhibit A.

Thomas Seidl, Supervisor of the Legal Services Section of the Appeals, Legal Services, and Criminal Investigations Division of the Department of Revenue, made the following statement in an affidavit in support of the Department's Motion:

> Because we were not sure whether there would continue to be enough work to justify a permanent position, we proposed a temporary position for one year initially at which time we would reevaluate our needs.

Affidavit of Thomas J. Seidl, at 1.

Petition asserts that the foregoing statements support his position that no one in Revenue or DOER knew how long the position would last. Therefore, neither Revenue or DOER could "fully anticipate" that the position would be of "limited duration" as required by Minn. Stat. 43A.08, subd. 2a, and the position was not properly designated as temporary unclassified by DOER.

Taking the quoted language of Boekhaus, Seidl, and Wemeier in the light most favorable to Petitioner, it is true that Revenue did not know how long it would need the Attorney I position. But that is not to say that Revenue or DOER knew that the position would be needed for more than one year. The issue then, is what does "fully anticipate" mean in the context of Minn. Stat. 43A.08, subd. 2a. Petitioner argues that, by the dictionary definition of those words, the Revenue must have "entirely" or "exactly" anticipated that the position would be of limited duration. Revenue argues that it did fully anticipate the position to be of limited duration.

The statutory standard, that the position be "fully anticipated to be of limited duration," is difficult to interpret. Revenue points to the authorization given by DOER for the Attorney I position as support for its contention that the position was of limited duration. The position was only authorized for one year. In that sense, the position was certainly of limited duration. However, the statutory language does not relate to the authorization given by DOER, but rather to the work expected to be performed by the incumbent of that position. If the sole question was how long was the position authorized for, the entire classified service could be subsumed into temporary unclassified positions.

The Petitioner's interpretation of the term "fully anticipated," that Revenue must know exactly or without question that the position will be of limited duration, is too stringent. DOER is statutorily authorized to review unclassified positions to determine if the positions should be placed in the classified service. Minn. Stat. 43A.08, subd. 3. Incumbents of positions transferred from unclassified to classified service may be appointed to the new position without competing for the position. Minn. Stat. 43A.15, subd.

7. The statutory scheme recognizes that personnel needs change and that the future needs of an appointing authority are sometimes unclear. To "fully anticipate" that a position will be of "limited duration," the appointing authority and DOER must reasonably conclude that the work to be performed by the position may not continue indefinitely. Being unsure of the length of the position falls within that definition.

The reasonable expectations of Revenue in requesting the temporary unclassified position determine whether it acted in good faith when requesting a temporary unclassified position. When the request was submitted, July 8, 1992, Revenue sought a person to perform "front-end work" to support a controversial statutory health care reform plan. June 30, 1992 Boekhaus Memorandum; July 2, 1992 Wemeier Memorandum. Such work is by its nature

short-lived. The history of the statutory plan itself shows that the legislation f aces an uncerta in future , and a lawsuit has been filed challenging the statute as unconstitutional. June I, 1993 McAfee Af fi davit, paragraph 3. Deperding upon what type of attention the statutory plan and further amendments require in the future, there may be no work to be performed by an Attorney I incumbent relating to Minnesota Care, there may be considerable work, or there may be work that can be done by non-attorneys.

In light of these factors, Revenue concluded the Attorney I position should be temporary, and the need for the position would be reviewed at the end of one year. Boekhaus Affidavit, at 6; July 2, 1992 Wemeier Memorandum. Under these circumstances, hiring a permanent employee would be unwarranted and unfair (especially to the newly hired employee if a layoff should be necessary). The situation present here is exactly why temporary unclassified positions are authorized. Efficiency in state government is maximized when employment needs are filled by the appropriate type of appointment. Where reasonably grounded uncertainty exists over the future of a position, the use of a temporary appointment is justified. The actions of Revenue in requesting a temporary unclassified position and of DOER in approving it were reasonable.

The Petitioner maintains that the proper procedure was not followed by DOER in designating the position temporary unclassified. He points out that documentation of final approval is dated October 29, 1992. The candidate chosen for the Attorney I position began work on October 14, 1992. The date listed on DOER's control sheet for approval of the Attorney I position is October 14, 1992. The sheet used by DOER shows the following dates:

Date Stamp for Receipt by DOER	July 8, 1992
Handwritten Comments	
"copy to Joe Reid/AG"	July 9
"left message for Barlow."	July 9
"hold"	July 10, 1992
"per Joe Reid-delegation was approved effective 9-8-92 copies to follow"	undated
Date Properly Documented Request Received	September 8, 1992

Approved By: Ann C. Phoenix /s/		September 8, 1992
Dates of Unclassified Designation		October 14, 1992 October 14, 1993
Signature: Suzanne Brothen /s/		October 29, 1992

Petitioner's June 1, 1993 Memorandum, Exhibit 5.

The dates on the form do indicate that the final written approval for the
position was not signed until after the successful candidate began work. However, the approval was granted effective the day that person started work

and oral approval or an expectation of approval had been given to Revenue. Boekhaus at Revenue expressed his belief that the position had been approved by DOER before soliciting interviews. Boekhaus Affidavit, paragraph 4. Seidel indicated that interviews were not conducted until after the position was approved. Seidel Affidavit, paragraph 4. Vikmanis at DOER suggested that in many cases, informal approval is granted before the documenation is completed to assist agencies in their hiring needs. Supplemental Vikmanis Affidavit, paragraph 3.

Petitioner argues that the lack of written approval on the day the person started work transforms the position into a classified position. No support has been cited for this conclusion. There is no evidence in the record that suggests Revenue or DOER ever sought any designation other than "temporary unclassified" for the position. Merely failing to execute paperwork promptly does not reclassify a position. No evidence has been introduced showing an improper motive on the part of either Revenue or DOER. The actions and dates on the Job Audit sheet for the position do not support an inference that DOER acted in bad faith in approving the Attorney I position.

As is readily evi dent from the notes on DOER's Job Audit sheet, the AG was involved in the approval of the Attorney I position for Revenue. This was due to the requirement for the AG to delegate authority to the incumbent of that position to represent the State of Minnesota as an attorney. The AG argues that its involvement was limited to the delegation of authority and therefore no claim under the Veterans Preference Act can be properly brought against the AG in this case. Petitioner maintains the AG exerted influence to ensure that a nonveteran was selected for the position.

The Petiti one r reli es upon the date of the document delegating authority as evidence that the AG specifically approved the successful candidate, and infers that the Petitioner was thereby intentionally excluded. Joseph Reid, the Director of Administration for the AG, has explained the circumstances

surrounding the delegation of authority. A committee of the AG considered the delegation request and prepared a draft, dated September 8, 1992, of the form which would accomplish the delegation. Reid Affidavit, Exhibit B. This draft left blank the name of the person to whom authority would be delegated. A memorandum, dated October 21, 1992, from Reid to Seidl, advised that the Attorney General had approved the delgation and transmitted a signed copy of that document. Reid Affidavit, Exhibit C. The executed document referred 2 to the successful candidate by name and contained a minor grammatical change. The date contained in the executed document was September 8, 1992.

21 Petitioner darkly hints that the change in language was designed to obscure the AG's involvement in this matter. The change replaces "I delegate authority to employ to advise the Department" with "I delgate authority to to advise the Department." The change merely improves the langauge of the delegation to better describe what the AG is actually doing. The Department does not need authority from the AG to employ anyone. Rather, the occupant of the Attorney I position with the Department must be delegated authority to represent the Department as counsel. Further, if Petitioner is correct in his contention that the delegation document was signed on September 8, 1992, this would require that the AG know in September that Petitioner would file a claim under the Veterans Preference Act on October 14, 1992.

The successful candidate was interviewed on September 8, 1992. Petitioner argues that the identical dates for both the delegation document and the interview prove that the AG had a hand in choosing that candidate. There are a number of memoranda from the AG concerning the delegation. In chronological order, they are:

draft position description circulated amongst delegation committee members	June 8, 1992
Reid memo to committee setting next meeting for June 30, 1992*	June 12, 1992
position description to Reid with note "probably requires a delegation"*	July 16, 1992
Reid memo to committee setting next meeting for August 6, 1992*	July 27, 1992
Reid memo to committee re-setting next meeting for September 9, 1992* and transmitting draft delgations	August 30, 1992
redrafted position description to Reid	September 2, 1992
Reid memo to Revenue transmitting signed delegation	October 21, 1992

Revenue Attorney I position on agenda for discussion

Petitioner's Memorandum in Support of Motion to Compel Discovery, paragraph 2.

Reid has stated that, despite the date on the delegation document, the document was not actually signed until mid-October, whereupon it was transmitted to Revenue. Reid Affidavit, paragraph 8. The only evidence on interviews held by Revenue shows that the first interviews, including Petitioner's interview, were conducted on September 4, 1992. The successful candidate was interviewed on September 8, 1992, and four more candidates were interviewed by

September 11, 1992, when the last interviews were held. Petitioner's conclusion here (that the successful candidate was already chosen) is

supported by the evidence, since the delegation is very unlikely to have been signed on September 8, 1992. A draft of that delegation was prepared for consideration by the AG committee during their September 9, 1992 meeting. Petitioner's June 1, 1993 Memorandum, Exhibit 7 (August 30, 1992 Memorandum). One of the interviewer's schedules contains that notation "can't offer job to anyone yet becuz DOER hasn't approved position." Id. Exhibit 1.

Petitioner's own contact with Revenue suggests that the delegation was not signed until mid-October. June 1, 1993 McAfee Affidavit, paragraph 1-3. The evidence shows the delegation was not signed until mid-October, supporting Reid's statement that "the Attorney General did not sign the form until the Department of Revenue told us who had been appointed to the position

Petitioner maintains that:

> If he (the Attorney General) signed it on a day other than 9/8/92, the delegation of authority must be seen to have been improper, and [the successful candidate], as a result, has been doing legal work for the state without authority.

Petitioner's June 1, 1993 Memorandum, at 6. This argument has nothing to do with veterans preference. Petitioner has not introduced any evidence to show that the AG exercised any control over the selection of the person to fill the position. The AG's delegation committee did review and modify the position description, as noted in the agenda items listed above and the notation on the draft position description itself. Vikmanis Affidavit, Exhibit B. The only involvement demonstrated in the record is with the drafting of the position description, not the selection of the person to occupy the position. Without any evidence of deeper involvement in the hiring process, there is no basis on which the AG could have violated Petitioner's veteran's preference rights. Petitioner's uspicions are baseless and absurd and create no genuine issues of fact. The AG is entitled to summary disposition in its favor.

Even if the Judge were to conclude that the AG had been involved in the decision on a particular person to hire in this case, the outcome would remain the same. Since the position was properly designated as "temporary unclassified," any method of selection that is otherwise lawful is available to Revenue. Had the AG been asked, any opinion received could be relied upon by Revenue.

A great deal of Petitioner's argument is based on a belief, often repeated, that the Respondents harbor a deep animus against veterans. Petitioner claims that the hiring demonstrates this, since the successful candidate was clearly not as qualified as Petitioner and, further, was not a veteran. The successful candidate's resume has been included in Petitioner's June 1, 1993 Memorandum as Exhibit 3. That resume demonstrates that the person hired had a very high level of academic achievement, ranking second in her law school class. She has previous experience in tax enforcement with the

Israel Internal Revenue Service. She served as a first lieutenant in the Israeli Defense Force from 1972 through 1973. Petitioner cannot claim that some conspiracy exists against veterans throughout DOER, AG, and Revenue, when

the person hired actually served in the military (albeit not the U.S. military). The selected candidate appears to have been very well qualified and Revenue's selection of her was obviously reasonable. There is no basis to even suspect that there was any intent to circumvent veterans preference. Since this supposed animus against veterans formed the base of Petition's house-of-cards arguments, its absence results in the collapse of the entire unwieldy structure.

While the evidence shows that the dates of various actions were not always documented promptly, it does not indicate that the designation of the position as temporary unclassified was in any way improper. Unfortunately, the confusion it caused did create sufficient doubt so as to require further discovery and delay a decision in this matter.

Revenue has presented a legitimate, statutorily authorized reason for filling the Attorney I position as a temporary unclassified position. The Petitioner has not identified any fact which supports an inference that Revenue, DOER, or the AG acted in bad faith. Thus, the position was properly designated as temporary unclassified. Because veterans preference does not apply to unclassified positions in state civil service, Petitioner's veterans preference rights were not denied in the hiring conducted for that position. The Respondents are entitled to summary disposition in their favor.

S.M.M.